IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SALES TAX REFERENCE No 10 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

M/S.CYNIDES CHEMICALS CO.

Versus

THE STATE OF GUJARAT

Appearance:

MR JAGDISH S JOSHI for Petitioner
MR HV CHHATRAPATI for Respondent No. 1

CORAM : MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

Date of decision: 04/12/98

ORAL JUDGEMENT

1. At the instance of dealer assessee Gujarat Sales Tax Tribunal has referred the following question of law arising out of its decision in Revision Applications Nos. 88 and 89 of 1990 decided on 5.9.92 along with group of cases:

"Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that as the Sales in the case of the applicant are tax-free, the question of invoking the provisions of Rule 50 of the Gujarat Sales Tax Rules, 1970 and Section 8(A) of the Central Sales Tax Act, 1956 would not arise?"

2. The petitioner is a limited company doing business of manufacture of chemicals and is a registered dealer under the Gujarat Sales Tax Act 1969 as well under the Central Sales Tax Act. The unit is holding exemption certificate under Entry 118 of Notification issued under Section 49 of the Act. The limit of exemption of tax up to which he is entitled to avail benefit of the incentive scheme is Rs.90.00 lakhs as pioneer industry. The exemption under the scheme envisages that an eligible unit is entitled to be exempted from payment of sales tax on sales of goods manufactured by it subject to a quantum limit determined under the scheme with relation to fixed capital investment. The further condition is that such exemption limit is to be availed within the limit fixed during which the exemption operates. Entry 118 which has been notified under Section 49, to give effect to incentive scheme. It also provides for finding out exemption limit availed by the dealer during the period of exemption. General condition envisaged that as soon as aggregate of amount of tax which should have become leviable from the specified manufacturer but for exemption under this entry or under Government notification issued under Section (5) of Section 8 of Central Sales Tax Act for this purpose or any draw back, set off or refund. For the dealer eligible to incentive under the scheme has two options, either to opt for sales tax exemption incentive or sales tax deferment incentives. The unit opting for exemption incentive is exempted from payment of tax altogether upto the limit within the period of exemption and at the same time he is not entitled to charge or collect tax on the sales made by it. That is to say, no part of sale price charged by it constitute any element of tax payable on such sales. On the other hand, the industrial unit which opts for deferment incentives is liable to pay tax and is entitled to collect tax on sales made by it, but, he is entitled to retain the amount leviable on him and collected by him as such, during the period of operation of deferment and only thereafter he is liable to make payment of such tax to the public exchequer without liability to pay interest thereon. Thus from the scheme it is clear that the industrial unit availing exemption incentive is not

liable to pay tax and is also not entitled to collect tax on his turnover.

3. In the aforesaid set of facts, a contention has been raised by the assessee before revenue authorities that while computing tax leviable from him during the period in question, by keeping out Entry 118, out of consideration, from the entire turnover of sales made by him, a sum calculated in accordance with the formula referred to in Rule 50(2)(i) be deducted to find out net taxable turnover by treating as if the total turnover as gross turnover contain sales tax payable on it also. This plea did not find favour with the assessing officer in the first instance. The Assistant Commissioner vide his order dated 30.4.1986 agreed with the contention of the assessee and remanded the case back for determining the tax leviable from the assessee by giving effect to Rule 50 in the manner suggested by him. In furtherance of that direction, the assessing officer had granted such deduction. The Deputy Sales Tax Commissioner in exercise of his revisional jurisdiction, set aside the said deduction holding that same is not eligible deduction. The revision of the assessee against the order of Deputy Commissioner of Sales Tax did not meet with success, before the Tribunal.

4. It has been contended by learned counsel for the assessee that if assessment on the turnover of the assessee is to be made without considering Entry 118 or without considering the exemption enjoyed by the assessee under Section 118, then, as a matter of course, provisions of Rule 50 are attracted for determining the taxable turnover to find out tax leviable on the assessee. He further contends that if effect is not given to Rule 50 by reducing the sale price recovered by the assessee during the period of exemption as per the formula envisaged thereon it would result in reducing the net exemption made available to him under the scheme.

5. On the other hand it has been contended by learned counsel for the revenue that as no part of sales during the continuance of the exemption period, until full exemption is availed off could include any tax in respect of such sales, the question of treating the sale price collected by the assessee as gross turnover to be reduced to a net turnover by separating element of tax therefrom does not arise. If the contention of the assessee is to be accepted according to the counsel for the revenue, it would result in increase in the total exemption limit from the payment of tax which is otherwise, leviable.

We have given our anxious consideration to the contention raised before us.

6. Rule 50, reads as under:

"Reduction of sale price for levy of tax.

A registered dealer may in respect of any sale on which the sales tax, general sales tax or in respect of any specified sale on which the sales tax is actually payable by him either -

(i) exclude the amount if any, collected by him separately way of sales tax or general sales tax, from the sale price on which tax is leviable.

Explanation : xxxx

(ii) deduct from such sale price of the goods a sum calculated in accordance with the following formula, namely :

$$\text{Formula : Sale Price multiplied by } \frac{R}{100 + R}$$

where "R" means the rate of tax applicable to sale or specified sale i.e. where the sale is liable only to sales tax, the rate of sales tax, where it is liable only to general sale tax, the rate of general sales tax"

Rule 50 on bare perusal makes it abundantly clear it operates in the case where it is to find out turnover on which tax liability is to be determined. Rate of tax is prescribed on sale price of goods at rate notified for that purpose. The sales tax being a specie of indirect taxes, the burden of it is passed on to buyer. The price charged from a purchaser may disclose element of tax charged separately in the bill from the sale price. It is not necessary to disclose the price bifurcation separately and a dealer may charge in lump sum. In the former, from the total amount charged the sales tax actually collected is deducted to find out taxable turnover on which tax is to be charged under subrule (i). In the latter, as the price contains element of tax, for determining the taxable turnover the tax element charged from the customer is to be separated therefrom by applying formula stated in subrule (ii). Thus

precondition for operating the rule 50 is sale price charged by dealer contains element of sales tax whether shown separately or as part of sale price but not shown separately so that TURNOVER on which sales tax is ACTUALLY PAYABLE is found out where the sale price charged by the dealer in fact does not contain any element of tax, and it cannot contain such element because tax is not actually payable by him, there is no room for determining taxable turnover on which tax is notionally leviable.

With reference to rule 50, where tax is not actually payable but is to be determined notionally for some other purpose, Rule 50 does not have any role to play. The reading of the rule further reveals that it does not provide abstract proposition of reducing the sale price by any formula, in the matter of taxable sales but depends what adjustment has to be made on the option of the assessee. If assessee had collected tax, separately by way of sales tax or general sales tax, such amount is to be reduced from the total amount charged by him showing sale price and tax separately. Where no such separate disclosure of the sale price and tax on such sale price is on the invoices, then, from such sale chargeable to tax, the same calculated as per formula stated in subrule (2) is to be deducted to find out actual sale price without element of any tax into it, in order to determine the actual tax payable by the assessee.

7. As far as the present case is concerned, there is no dispute that assessee is not liable to pay tax on the sales of the new industrial unit which has been classified as pioneer industry, and that he is not entitled to charge any tax separately or inclusively as a part of his price from his purchasers. If any part of his sale price is attributable to collection of tax thereon, the assessee commits the breach of conditions of exemption and is liable to lose such benefit. Therefore there is no warrant to suggest that for the purpose of tax leviable on sale price collected by him it should be further reduced by a sum attributable to tax chargeable of him on the rate prescribed for the commodity in question by deeming that the sale price charged by him though in fact did not include any tax, though in fact assessee was not entitled to charge any part of his sale price as tax, yet for the purposes of computing tax leviable, in order to find out the extent of exemption enjoyed by him to be adjusted against the exemption limit, as if such sale price had ingredient of tax chargeable thereon.

8. There is no room for a assuming a legal fiction for the purpose of reducing the actual turnover of sales of goods manufactured by the assessee to a lesser sum to reduce the extent of tax notionally leviable as distinct from actually payable on such sales for the purpose of finding out the extent of exemption awarded by the assessee. The contention raised by the assessee postulates firstly to assume that part of the sale price charged by him includes sales tax payable on it. It also assumes that but for operation of entry 118, the assessee would still have charged same price as inclusive of sales tax in order to attract provisions of Rule 50, subrule (ii). Both the assumptions, in our opinion, cannot be made in the absence of any statutory provision in that regard. Moreover if this were to be assumed that but for exemption assessee would still charge the same sale price as inclusive of sales tax, and no tax would have been charged separately, will lead to irresistible conclusion that notwithstanding prohibition contained in the scheme, the assessee is collecting tax from purchasers on his sales, carrying the assumption to its logical end. That will amount to breach of condition of exemption, entailing withdrawal of any exemption altogether.

9. In effect, the assessee's contention is founded by converting the limit of exemption from payment of tax determined under the provisions of incentive scheme into exemption of gross turnover on which tax is payable and then to find out such amount of tax will be payable on the discounted value in terms of Rule 50. This would be altering the very edifice of the exemption spelt out in the scheme by substituting assessee's own formula of determining the extent of benefit with reference to altogether different yardstick than what is provided under the exemption provision itself.

10. The clear result of giving effect to Rule 50(ii) as suggested by the assessee by considering the sales made by the assessee, which is bereft of any element of tax liability, as gross turnover having element of tax liability embedded therein and to apply the formula of net taxable turnover, shall be in extending the limit of exemption from payment of tax from what has been determined under the provision, and to read into the scheme that the dealer shall be exempt from payment of tax on gross turnover of maximum limit in stead of exempt from payment of tax upto certain amount.

11. The contention is contrary to all cannon of interpreting the statutory provisions and we are unable

to accept the same.

10. As a result, we answer the question referred to us in affirmative, that is to say, in favour of the revenue and against the assessee.

There shall be no order as to costs.

(Rajesh Balia, J)

(A.R. Dave, J)